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No. 93-1096

In The

Supreme Court of the United States

October Term, 1993

STANLEY R. HUTSELL,

Petitioner,

v.

RAY SAYRE, an Officer of the University of Kentucky Police Department, Individually,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JOHN C. DARSIE
Counsel of Record
Office of Legal Counsel
Room 2, Administration Building
University of Kentucky
Lexington, Kentucky 40506-0032
(606) 257-2936

STEPHEN L. BARKER
PHILLIP M. MOLONEY
STURGILL, TURNER & TRUITT
155 East Main Street
Lexington, Kentucky 40507
(606) 255-8581

JOHN T. BALLANTINE
OGDEN, NEWELL & WELCH
1200 One Riverfront Plaza
Louisville, Kentucky 40202-2973
(502) 582-1601

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

I. Was the Decision of the Court of Appeals for the Sixth Circuit Determining that Respondent Ray Sayre was Entitled to Qualified Immunity in His Individual Capacity Consistent with Established Precedent of this Court?

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STATEMENT OF THE CASE

Petitioner's Statement of the Case omits critical facts relied upon by the opinions of the Courts below. By failing to provide an accurate account of the facts of record, Petitioner misrepresents the tenor of this case. The following undisputed facts of record clearly demonstrate that the courts below correctly applied this Court's qualified immunity precedent and that there is no reason to review the decision below.

Between 1:30 a.m. and 2:00 a.m. on Saturday morning, September 22, 1990, on the campus of the University of Kentucky (hereinafter "U.K."), Stacey Prieshoff, a U.K. student, was physically assaulted while walking toward the apartment complex in which she lived. Prieshoff was walking toward the complex when she saw a man approaching her. Upon passing the man, she was suddenly struck in the head.

Prior to the assault, Prieshoff had about forty (40) seconds to observe her assailant. He then blindfolded her and warned her to be quiet. After forcibly removing Prieshoff's shorts and underwear, the assailant abandoned his attack and fled. Prieshoff clothed herself and quickly summoned some other students who then called the U.K. Police.

Upon arrival at the crime scene, U.K. Officer Hayes was handed several significant items found at the crime scene (subsequently returned to their original location at the scene) by two students who had responded to Prieshoff. These included articles of Prieshoff's clothing and a wallet containing a driver's license and a Lexington Transit I.D. card, each bearing a photograph of a black male

identified as Stanley Hutsell, the Petitioner. At approximately 5:30 a.m. that morning, officers made several attempts to contact Petitioner by telephone, but Petitioner's phone was never answered.

That same morning the police went to the two addresses listed on Petitioner's wallet identification cards. Neither Petitioner nor his vehicle were located at either address. Officers also visited Petitioner's place of employment, but Petitioner was not at work that day.

The following Monday, U.K. officers ran a computerized criminal history check on Petitioner. It revealed that Petitioner had been previously arrested for criminal solicitation-prostitution among other things. U.K. Officer Hayes then prepared a photographic line-up with the assistance of Detective Lynn Dalton of the Lexington-Fayette Urban County Police Department, who supplied photographs maintained in that department's files. Along with a photo of Petitioner, the officers selected other photographs of black males with a history of arrests for sexual offenses, with physical characteristics similar to those of Petitioner.

That afternoon, Officer Hayes showed Prieshoff the six photographs he had obtained, requesting that she take her time, not rush, and pick out the person whom she thought attacked her if, in fact, he were one of the six. Within one minute, Prieshoff picked Petitioner's photograph. She stated that she could not be "one hundred percent certain," commenting that it was a lot harder to pick a photograph than a person. Prieshoff explained that Petitioner "was the person, you know, out of the line-up, I was drawn to that picture and that I felt that, you know,

he was – he was the one." Prieshoff identified Petitioner at his criminal trial and was "one hundred percent" sure that he was the assailant.

During the course of the officers' three month investigation, Petitioner gave two statements to police officers, both of which were replete with inconsistencies. Initially, he told Officer Sayre that he might have lost his wallet at the U.K. Hospital, where he was visiting his wife who was a patient there. However, U.K. Hospital records indicated Mrs. Hutsell had not been a patient there since 1986. In his second interview, Petitioner claimed his wife was hospitalized at St. Joseph's Hospital. Petitioner supplied no explanation for his wallet being found at the crime scene.

Following consultation by U.K. officers with assistant Commonwealth's attorney, Joe Bouvier, who advised that there was probable cause to charge Petitioner, Officer Sayre filed a Criminal Complaint (in affidavit form) accusing Petitioner of the assault on Prieshoff on December 14, 1990. Sayre drafted the Complaint in the chambers of Chief Fayette District Judge Thomas Clark. Judge Clark questioned Sayre about the case at that time. During these exchanges, Sayre told Judge Clark all the facts he knew about the case. Upon completion Sayre presented Judge Clark with the Complaint. After reviewing it, Judge Clark told Sayre that the Complaint was too detailed and should be shortened to "just specifically what happened and specifically where it happened and who was involved." Sayre revised the Complaint as directed. Judge Clark immediately reviewed it and caused a warrant to issue for Petitioner's arrest.

Following his acquittal from the criminal charges, Petitioner filed this 42 U.S.C. § 1983 action alleging violations of his Fourth and Fourteenth amendment rights by U.K. police officers, Ray Sayre and W. A. Hayes, and the Board of Trustees of the University of Kentucky. Specifically, Petitioner claimed that the arrest warrant was sought without probable cause.

Upon Motions to Dismiss and for Summary Judgment, the District Court ruled that: 1) Petitioner's claims against U.K. and the officers in their official capacities were barred by the Eleventh Amendment, and 2) that the officers were entitled to qualified immunity in their individual capacities. The United States Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court, holding, *inter alia*, that Petitioner had failed to raise any genuine issues of material fact to the effect that the statements in Sayre's Complaint were false or in reckless disregard of the truth, and that Sayre "clearly had sufficient indicia of probable cause to believe Petitioner had committed the crime" (Sixth Circuit Opinion, Petitioner's Appendix 19a). The Petition for Writ of Certiorari (hereinafter "Petition") challenges only the adequacy of Sayre's Affidavit in the context of his entitlement to qualified immunity. The Petitioner does not raise procedural issues regarding the summary judgment nor substantive issues regarding Officer Hayes' entitlement to qualified immunity or U.K.'s entitlement to Eleventh Amendment immunity.

REASONS FOR DENYING THE WRIT

Respondent Sayre is Entitled to Qualified Immunity Pursuant to Clearly Established Precedent.

A. Respondent Sayre's Affidavit was Truthful.

Petitioner alleges in the Petition that the statement in the Complaint, "the Complainant advises that she was struck from behind . . . by a subject she later identified" is " . . . a material false statement made by Sayre knowingly and intentionally or with reckless disregard for the truth" because Prieshoff did not "positively" identify Petitioner to Officer Hayes as the assailant. (Petition, p. 6.) Petitioner then claims that his Fourth Amendment rights were violated through the issuance of a warrant based upon a material false statement contained in the Complaint, which was insufficient to establish probable cause. Based on the foregoing assertions, Petitioner complains that the courts below, in determining that Sayre was entitled to qualified immunity, improperly considered Sayre's oral statements to Judge Clark (Petition, p. 8).

The fatal flaw in this argument is apparent. Initially, it must be noted that the issue was raised in the § 1983 qualified immunity context, and did not involve the introduction of evidence at Petitioner's criminal trial. More importantly, neither court below determined that Sayre's Complaint was, in fact, false, or even that a material issue of fact existed regarding the truth or falsity of the Complaint. Petitioner argues that Stacey Prieshoff's statement to Officer Hayes that she could not be "one hundred percent certain" during her identification of Petitioner in the photographic line-up means that Prieshoff had not positively identified Petitioner as the

assailant. This tortured interpretation was soundly rejected by the courts below and has no basis of record. The argument was properly rejected because it simply ignored Prieshoff's prompt identification of Petitioner's photograph from the line-up, her comments that she was "drawn to the photo" and was thereafter comfortable with her selection, and her positive, face-to-face identification of Petitioner at trial.

Furthermore, Petitioner's argument ignores the other facts supporting Prieshoff's idetification of Petitioner available to Sayre as determined by the Sixth Circuit in granting him qualified immunity under § 1983, including the fact that: (1) Petitioner's wallet containing picture identification was found at the scene of the assault; (2) Petitioner could not be located on the morning of the attack; (3) he had been previously arrested for a sexual offense; (4) Petitioner had given inconsistent statements to investigating officers; and that (5) Plaintiff had a baseball bat in his truck and that U.K. student Fox had stated that Prieshoff thought she had been hit with a bat. (Sixth Circuit Opinion, Petitioner's Appendix 18-19a.) As the Sixth Circuit properly held, Sayre had sufficient indicia of probable cause to believe Petitioner committed the crime, and was therefore entitled to qualified immunity. Simply stated, the courts below properly determined that the Complaint was neither false nor reckless.

B. The Holding of This Case Is Consistent With This Court's Qualified Immunity Decisions.

The law regarding qualified immunity of public officials in § 1983 actions is well known and will not be

repeated here. See *Harlow v. Fitzgerald*, 457 U.S. 800, 73 L.Ed.2d 396, 102 S.Ct. 2727 (1982). Petitioner argues that the Sixth Circuit strayed from this Court's pronouncements on the subject based upon his fallacious premise that Respondent Sayre's Complaint misrepresented Prieshoff's identification of Petitioner. Petitioner then asserts that the Sixth Circuit's opinion stands for the proposition that a determination of probable cause for qualified immunity purposes in § 1983 actions differs from "such a determination in a criminal action." (Petition, p. 11.) The difference, Petitioner argues, lies in the Sixth Circuit's reliance on the facts available to Sayre which were not, at the request of Judge Clark, contained in Sayre's affidavit.

This argument fails for several reasons. First, the Sixth Circuit in its analysis of Sayre's entitlement to qualified immunity, properly relied upon the facts developed in Sayre's investigation. This analysis was appropriate to reject Petitioner's argument that Sayre was not entitled to qualified immunity because a reasonably well-trained officer in Sayre's position would have known that Prieshoff failed to positively identify Petitioner as her assailant. Secondly, the Court relied upon the facts developed in the investigation to conclude that a "reasonable officer in Sayre's shoes would have gone forward with the revised complaint after he had been explicitly instructed by a Judge to shorten it after the judge had reviewed the original." (Sixth Circuit Opinion, Petitioner Appendix 17a.) Petitioner complains here about the Sixth Circuit's reliance on these facts because they completely destroy his argument that a reasonably well-trained officer in Sayre's position would not have applied for the warrant.

In so determining, the Sixth Circuit properly followed this Court's qualified immunity decision in *Malley v. Briggs*, 475 U.S. 335, 106 S.Ct. 1092, 89 L.Ed. 2d 271 (1986). In that case, this Court held that police officers are entitled to qualified immunity unless the warrant is so utterly lacking in probable cause that no officer of reasonable competence would have concluded that a warrant should issue. *Id.* at 345. *Malley* further provides that "as the qualified immunity defense has evolved it provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Id.* at 341. If officers of reasonable competence could disagree as to whether a warrant should issue, Sayre is entitled to qualified immunity. *Id.* at 341.

Based on the foregoing law, the Sixth Circuit's decision affirming the District Court's granting of qualified immunity to Sayre and examining the investigation conducted by Sayre was neither incorrect nor novel. This Court's standards for application of qualified immunity for police officers required the courts below to examine the facts available to Sayre to determine "whether a reasonably well-trained officer in [Sayre's] position would have known that his affidavit failed to establish probable cause *and* that he should not have applied for the warrant". *Id.* at 345 (emphasis supplied). In other words, *Malley*, requires two inquiries: (1) the sufficiency of the complaint or affidavit and (2) whether the officer should have applied for the warrant. *All* of the facts known to the officer are obviously relevant to the second inquiry. The courts below properly applied these standards in granting Sayre qualified immunity by examining all of

the facts available to Sayre for the purpose of the qualified immunity analysis.

Simply stated, there is no reason for this Court to review the decision below. Petitioner has merely created a phantom issue that is not supported by the record. Further, there exists no error with the application of the law by the courts below.

CONCLUSION

Based on the foregoing, Respondent respectfully requests this Court to deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully Submitted,

JOHN C. DARSIE
Counsel of Record
Office of Legal Counsel
Room 2, Administration Building
University of Kentucky
Lexington, Kentucky 40506-0032
(606) 257-2936

STEPHEN L. BARKER
PHILLIP M. MOLONEY
STURGILL, TURNER & TRUITT
155 East Main Street
Lexington, Kentucky 40507
(606) 255-8581

JOHN T. BALLANTINE
OGDEN, NEWELL & WELCH
1200 One Riverfront Plaza
Louisville, Kentucky 40202-2973
(502) 582-1601